No. 15,235

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. COX, also known as George M. Cox,

Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD.,

Appellees.

Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from summary judgment for defendants and from an order denying plaintiff's motion for leave to file supplemental complaint, each made and entered by the United States District Court for the Northern District of California, Northern Di-

vision, in an action originally filed in the Superior Court of the State of California, in and for the County of Shasta and removed to said District Court. The jurisdiction of said District Court is conferred by United States Code Title 28, Section 1441 and the jurisdiction of this court upon appeal is conferred by the United States Code Title 28, Section 1291.

II.

STATEMENT OF THE CASE.

This is an action originally brought in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy, whereby plaintiff sought to recover thereunder for the loss which he sustained as the result of a fire. The defendants removed said cause to said District Court on the basis of diversity of citizenship.

The answer of the defendants denies any loss and sets forth six affirmative defenses, four of which are based upon the following clause in the fire insurance policy:

> "No suit or action on this policy for recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with and unless commenced within twelve months next after the inception of the loss."

These affirmative defenses allege that the plaintiff has not complied with the following requirements of said policy:

1. The plaintiff failed to render to the defendants the proof of loss required by said policy within the time therein specified.

2. The plaintiff failed to submit to an examination under oath.

3. The defendants demanded that the amount of the loss be appraised and that said appraisement was not completed at the time of the commencement of the action.

4. The plaintiff failed to furnish an inventory of the lost, damaged and undamaged properties as directed by the policy.

In addition thereto, there is set up by way of affirmative defense that the complaint fails to state a claim upon which relief can be granted and alleges upon information and belief that plaintiff willfully concealed and misrepresented to defendants material facts concerning the subject of the insurance.

After the answer was filed the defendants insurance companies filed a motion for summary judgment on the ground that the defendants were entitled to judgment as a matter of law. As shown by their supporting memorandum (R 15), the motion was premised upon one ground only, that is, "the submission to arbitration is a condition precedent to the filing of a cause of action under a fire insurance policy and until such submission is made, no cause of action exists". This motion was submitted on the five affidavits attached to defendants' said motion (R 15) and the affidavit of the appellant George H. Cox. (R 41.) Shortly

after the filing of said motion, the plaintiff and appellant herein moved the court for leave to file his supplemental complaint wherein he desired to set forth that an award of the arbitrators had been made (at a date subsequent to the filing of said action). The two motions were submitted together. The District Court granted the motion for summary judgment upon the ground that "there was no genuine issue as to whether or not plaintiff submitted to the demand of the defendants for an appraisement pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action and that the plaintiff did not submit to and that there has been no appraisal pursuant to the terms of the policy of insurance prior to the filing of this action." (R 77.) By the same memorandum and order the court denied the plaintiff's motion for leave to file a supplemental complaint. (R 63.) This appeal is from the summary judgment and the order denying leave to file supplemental complaint.

III.

STATEMENT OF FACTS.

The summary judgment was given pursuant to Rule 56 of the Rules of Civil Procedure, upon the ground that the pleadings and affidavits on file showed that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law". We will set forth herein the matters

which show that there was a genuine issue as to many material facts and to this end will primarily review the facts set forth in the affidavit of the plaintiff and appellant herein.

On the 19th day of December, 1952, plaintiff purchased from defendants a policy of fire insurance whereby his dwelling was insured for $10,000.00 and his household furnishings and personal property for $3,000.00. The policy had a term commencing December 19, 1952, and ending on December 19, 1955, and plaintiff paid defendants the premium of $162.50 (see the insurance policy).

At the hour of 1:20 o'clock A.M. on the 25th day of January, 1953, plaintiff's dwelling and all of its contents were destroyed by fire. After plaintiff received certain medical attention for injuries suffered during the fire, he called upon Frank Plummer, the defendants' insurance agent at Redding, California (from whom he had procured the subject policy), and reported the fire. This agent advised plaintiff that the adjuster for the insurance carriers was General Adjustment Bureau, Inc., which maintains an office in Redding, with Mr. J. S. Rogers in charge. Mr. Plummer volunteered to contact Mr. Rogers. Shortly prior to 10:00 o'clock A.M. on the day of said fire, Mr. Rogers contacted plaintiff and they went to the scene of the fire in Mr. Rogers' car. During the course of the trip, plaintiff made a full disclosure of all facts and circumstances surrounding said fire and the losses thereby suffered and answered all questions that Mr. Rogers propounded.

Thereafter, plaintiff contacted both Mr. Rogers and Mr. Plummer three or four times for the purpose of obtaining proofs of loss and for assistance in doing all the things that were necessary under the policy for the insured to do in order to effect the collection of the loss thereunder, but it was not until the 16th day of March, 1953, that Mr. Rogers commenced assisting the insured in the preparation of the proofs of loss. To that end, Mr. Rogers had requested that the insured procure an inventory of all personal property destroyed, except the personal wardrobe of the insured and his family, explaining to the insured that said insurance companies had a lump sum allotment covering losses of personal wardrobes. This inventory was furnished to Mr. Rogers and forwarded by him to the insurance companies with the proof of loss.

The nature and extent of the insured's losses were again fully discussed with Mr. Rogers on the morning of March 16, 1953, when the proofs of loss were filled out and executed. Mr. Rogers assumed the obligation of filling out the entire proof of loss with the exception of the introduction part and the sworn statement and in permitting this method to be followed, the insured assumed that the insurance companies' adjuster knew the requirements of his carriers in this regard. At all of these times the insured willingly and promptly did everything that Mr. Rogers and Mr. Plummer requested of him and at no time did the insured refuse to disclose or give any information requested. Several weeks thereafter, but prior to April 30, 1953, Mr. John W. Smith, adjuster for the General Adjustment

Bureau, Inc., from its Sacramento office, called on the insured at his residence and questioned him at great length relative to the fire and his losses. At this time the insured fully cooperated and answered every question asked him. Nothing further was said until the insured received the General Adjustment Bureau's letters of April 29 and 30, which are Exhibits B and C, respectively, to the affidavit of J. W. Smith. (R 21-22.)[1] Upon the receipt of these letters, the insured called upon Mr. Plummer and told him of the receipt of these letters. They discussed the fact that such letters demanded that the insured be examined under oath in reference to the fire loss and fixed a time and place for such examination and further notified him that the proofs of loss did not fulfill the requirements of the policy and directed that the insured remedy the purported defects therein by filing amendments thereto. At that time, Mr. Plummer stated to the insured in effect that he was fearful that the companies would not pay under the policy and that these letters could be the foundation for their refusal and advised the insured to employ a lawyer before he appeared at the examination requested therein. At that time appellant employed L. C. Smith and Leander W. Pitman. On the 11th day of June, 1953, the appellant filed an action in the Superior Court of the State of California, in and for the County of Shasta, seeking to recover for his loss under said policy. A copy of said complaint is attached to the affidavit of George

[1]It is to be noted that these letters were addressed to the insured, in care of Redding Tire Service, 2638 Angelo, Redding, California, and were promptly received by the insured.

H. Cox and marked Exhibit A. Thereafter, the defendants insurance carriers filed their answer, a copy of which is also attached to said affidavit and marked Exhibit B. Said answer denied that the sum of $13,000.00 or any other sum whatsoever was due plaintiff from defendants and denied that the plaintiff had fully performed all the conditions on his part to be performed by specifically alleging solely that the proof of loss was defective and that the plaintiff failed and refused to submit to examination under oath. Nothing was alleged in the answer respecting an appraisement.

Said cause came to trial on November 3 and 4, 1953, at which time plaintiff was called as a witness and after being first duly sworn testified fully as to the origin of the fire, the nature of the loss, the cost price of the lost property, the market value of the loss and the nature of the items lost. This covered fully the entire subject matter that any examination under oath could cover. At the close of the plaintiff's case, the court expressed itself of the opinion that plaintiff had a substantial sum of money due and owing under the terms of the policy and that there was a grave question in his mind as to whether or not the request of the insurance companies demanding that the insured submit to an additional examination under oath might, under the law, be held to have been a failure to comply with the requirements of said policy. The court further thought that the path of litigation might be hazardous. The counsel for the insured replied that if the court was of that opinion that so far as the plaintiff was concerned he would raise no objections

to the court granting a nonsuit on its own motion, providing it was without prejudice, and the court thereupon did so.

After the trial of said action (November 4, 1953), the insured offered to submit to oral examination by letter to said insurance carriers dated December 21, 1953, and on January 3, 1954, he submitted a supplemental proof of loss containing all the details requested which, for all material purposes, was a duplication of the information theretofore presented. Although the motion for nonsuit was granted on November 4, 1953, the insurers did nothing relative to said policy until the letter of December 23, 1953. Instead of sending said letter to the insured's address, they addressed it to P. O. Box 407, Redding.[2] In view of the fact that said post office box was not the insured's box, the same was not delivered to him by the post office until he was located, that is, until the 6th day of January, 1954. By said letter the insurance carriers for the first time purported to invoke the provisions of the insurance policy relative to appraisement. This letter was not received until 11 months and 12 days after the fire. Within the time allotted by said policy, to-wit, January 13, 1954 (see Exhibit C attached to Stocklmier's affidavit (R 32)), the insured by letter to the carriers named H. J. Bachtold as his appraiser, subject, however, to the following condition:

> "I demand that you, forthwith, and in any event on or before *January 22, 1954 at 4:00 o'clock p.m.*

[2]His attorneys' address.

> of day, pay to me the sum of $13,000.00 for the loss sustained by the fire, covered by the policy No. PCD 983103, and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability." (R 33.)

The insured received no reply to this letter. Since nothing was done by 4:00 o'clock P.M. on January 22, 1954, and in view of the fact that under the provisions of the policy, the time to commence suit therein expired unless commenced within twelve months next after the inception of the loss, the insured directed his attorneys to file an action in the Superior Court of the State of California, in and for the County of Shasta. This was done at 4:00 o'clock P.M. on January 22nd, the last day the court would be open for the filing of actions within the twelve-month period.

There is utterly no evidence that the delay in completing the appraisal before the twelve months' period expired was caused by the insured. To the contrary, on January 15, 1954, Harry Bachtold, the plaintiff's appraiser, wrote to Mr. Howard T. Russell, the insurers' appraiser, advising him of his appointment and telling him that on January 16 he expected to examine the testimony given at the trial of the case and the proof of loss and ascertain the materials and costs in this locality, and thereafter he would be prepared to proceed with their duties. He further advised that he was available on any day of the next week (January 18 to 22) for consummating said appraisal. Mr. Bachtold also advised Mr. Russell that

the insured expressed the view that he would like to have the matter disposed of at an early date. (R 35.) This letter was received on January 18, leaving five days prior to the outlawing, which may have been ample time for two reasonable men to agree upon an appraisement. Irrespective thereof, the insurers' appraiser did not even seek to obtain a date for such meeting until he telephoned Mr. Bachtold on January 27, 1954 (which was two days after the right to commence the action had lapsed. (R 47).) The two subsequent letters between Messrs. Bachtold and Russell deal merely with the endeavors to agree upon a date (R 36-37) which shows no fault or participation of the insured. Since the two appraisers failed within the time fixed by the policy to agree upon a disinterested umpire, Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, did on the 22nd day of September, 1954, select W. N. Zachary as such umpire and that on the 18th day of December, 1954, said umpire notified the plaintiff and defendants that he would meet with said appraisers on the 4th day of January, 1955, and he then and there heard testimony and also made examination and inspection of the site of the destroyed dwelling and such ruins as remained. The appraisal of the two appraisers ended in a disagreement and their said differences were submitted to the umpire and on the 10th day of March, 1955, said umpire agreed with the insured's appraiser and made the award in writing, wherein and whereby the actual cash value of the loss of the dwelling house and garage was fixed at $9,500.00 and the actual cash value of

each of the items of personal property likewise destroyed was appraised at $5,205.00. The original appraisement or award was filed with the defendant English-American Underwriters, on the 29th day of March, 1955. (R 56-57.)

IV.

SPECIFICATIONS OF ERROR.

1. The District Court erred in granting defendants' motion for summary judgment and in finding from the pleadings and affidavits on file that no genuine issue as to any material fact was shown and that defendants were entitled to a judgment as a matter of law. To the contrary such evidence would have supported a verdict in favor of plaintiff.

2. The court erred in holding that the submission to arbitration was a condition precedent to the maintenance or filing of said action.

3. The court erred in holding that the defendants were not estopped to raise the plea of abatement of the action.

4. The court erred in holding that the defendants did not waive any right to raise their plea of abatement on a purely technical ground after the statute of limitations had run.

V.

ARGUMENT.

As stated heretofore, the summary judgment was based solely upon a plea of abatement, to-wit, the issue of prematurity. It was premised entirely upon the court's finding that "there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that plaintiff did not submit to and that there has been no appraisal pursuant to the terms of the policy of insurance prior to the filing of this action." (R 77.)

As shown by the policy, the appraisal is not self-executing. The appraisal is based upon the presence of two conditions precedent, that is, (1) that the insured and the company have failed to agree as to the actual cash value or the amount of the loss and then (2) an appraisal can be had on the written demand of either. The provision of the policy with reference to appraisals is as follows:

> "APPRAISAL. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire

shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

The claim of prematurity is based upon the following provision of the policy, "no suit or action on this policy for the recovery of any claim shall be sustained * * * unless all the requirements of this policy shall have been complied with and unless commenced within twelve months next after the inception of the loss."

The case at bar was filed on the last court day within the twelve months next after the inception of the loss, just prior to the running of the statute of limitations provided in said policy. Since plaintiff did not receive the written demand for an appraisal from the defendant until January 6, 1954, and since plaintiff selected his appraiser on January 13, 1954 (well within the twenty-day period prescribed by the policy), there remained approximately nine working days in which to complete the appraisal. At 4:00 o'clock P.M. on the last court day in which to commence said action, the appraisal was not completed nor had the appraisers even met. To construe the provisions of the policy to mean that the action can not be commenced

until the appraisal is filed, irrespective of when the written demand therefor was received, would create a trap for the unwary and deprive insureds of the proceeds of their policies by dilatory tactics on the part of the insurer.

In this suit on a fire insurance policy for losses occurring in California the policy must be construed under California law (*Hayland v. Millers National Insurance Co.,* 191 Fed. (2d) 735 at 737). We desire at the outset to refer to the decision of the Supreme Court of California in *Bollinger v. National Fire Insurance Company,* 25 Cal. (2d) 399. In that case the insurer and the assured entered into an agreement fixing the amount of the loss in a given amount. On the same day the defendant denied all liability under the policy on the ground that at the time of the fire the insured was not the sole and unconditional owner of the insured personal property. Before the lapse of 30 days from the time of the agreement upon the amount of the loss, the insured filed an action to recover under said policy. The defendant asserted the defense of prematurity, based on the policy provision that no action should be commenced until the lapse of a waiting period of 30 days from the time of the agreement upon the amount of the loss. The trial court granted a judgment of nonsuit based thereon at a time when the one-year statute of limitations had run. The insured then commenced a new action and the defendant demurred, claiming that the action was barred because it was commenced more than fifteen months after the fire. The trial court sustained the

demurrer and the plaintiff appealed. We desire to refer to the language of the court relative to pleas of abatement as to issues of prematurity appearing on page 405:

> "The insurance policy incorporated by reference in the complaint is of the usual complexity. While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, it must not be forgotten that the primary function of insurance is to insure. When claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits. (Citing cases.) * * * Dilatory tactics are not favored by the law, for they waste the court's time, increase the cost of litigation unnecessarily, and may easily lead to abatement of an action on purely technical grounds after the statute of limitations has run. (Citing cases.) Defendant's plea of prematurity was a dilatory plea in abatement, unrelated to the merits and not asserted for nearly a year after plaintiff's action was filed."

Further, the Supreme Court on page 411 stated the following relative to the assurer's duty of good faith to its insured:

> "'* * * The present case involves an insurer whose duty of good faith in dealing with the insured is well established. (See 13 Appleman, Insurance Law and Practice 37; Vance, Insurance (1930) 74.) It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of con-

> tracting and persists throughout the period when premiums are paid and no return is sought, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm's length. It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture."

We believe these general principles of law were not given proper weight by the trial court. Under the facts heretofore stated and as will be demonstrated hereinafter, a genuine issue as to liability of the insurer exists in the case at bar. In order to justify the trial court's summary disposition of all issues made by the pleadings and to deprive the plaintiff of his right to trial by jury, this Honorable Court must hold, as so ably was stated by the late Judge Cardozo:

> " 'To justify a departure from the course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.' Curry v. Mackenzie, 1925, 239 N.Y. 267, 270, 146 N.E. 375, 376."

See the opinion of this court in *Byrnes v. Mutual Life Insurance Company of New York,* 217 Fed. (2d) 497 at 500.

In interpreting Rule 56, the Supreme Court of the United States has stated that said rule:

> "* * * authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 1944, 321 U.S. 620, 64 S.Ct. 724, 728, 88 L.Ed. 967."

We respectfully contend that the affidavit of the insured, as well as the other affidavits on file, presents issues and sets forth sufficient facts to warrant a verdict in insured's favor by a jury to whom the issues might be presented for several reasons. These reasons will be listed under the following subheadings.

(A) THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT; A GENUINE ISSUE AS TO MATERIAL FACTS WAS SHOWN BY THE PLEADINGS AND AFFIDAVITS AND, IN FACT, THEY ARE SUFFICIENT TO SUPPORT A JUDGMENT IN FAVOR OF PLAINTIFF.

The summary judgment was based solely upon the finding that "there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the

policy of insurance, prior to the filing of this action". (R 77.) This finding finds no support in the record whatsoever.

It was not necessary to submit the question of the amount of damages sustained to arbitration as a necessary prerequisite to maintaining an action on the fire insurance policy for the reason that the policy provided first, that there must be a dispute regarding the amount of the loss and, secondly, a written demand for appraisal must be served by one party upon the other in a time and manner that would permit a submission. (Of course, the provisions of a policy relative to appraisal could also be waived or lost by estoppel.) It is only when both of these conditions occur that the provisions relative to appraisements become applicable.

There is no evidence in the record that the insurers and the insured failed to agree as to the actual cash value or the amount of the loss, nor is it shown that any endeavor was ever made by them, either to agree or disagree in that regard. The record does show that two of the agents of the insurers' adjustment bureau visited the premises shortly after the fire occurred and, hence, the company should be charged with knowledge of total loss of the properties. The only evidence as to the insurers' reaction to the amount of the loss appears in its answer to the first action in Shasta County. In Paragraph V of said answer the insurers denied that the sum of $13,000.00, *or any other sum whatsoever is now due plaintiff* from defendants. (R 52.) This allegation constituted an unconditional de-

nial of liability. Therefore, it is respectfully submitted that the first condition precedent to the requirement of appraisal, namely, the failure to agree as to the amount of the loss, is not shown.

Relative to the written demand, the same was received from the insurers by the insured at a time when it was difficult, if not impossible, to perform. The record is entirely void of any proof that the plaintiff failed or was in any manner unwilling to submit to such demands and the appraisal pursuant thereto. But to the contrary, the plaintiff did everything he could to effect a submission.

The provision of the policy relative to the commencement of suit is extremely pertinent:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity *unless all the requirements of this policy shall have been complied with,* and unless commenced within 12 months next after inception of the loss."

It is to be noted that the two conditions which defeat a suit are that all the requirements of the policy have not been complied with by the insured and, secondly, under any circumstances the action must be commenced within 12 months next after the inception of the fire. We respectfully submit that the insured complied with all of the requirements of the policy with respect to appraisal. The written demand dated December 23, 1953, was not received by the insured until January 6, 1954. (R 32, 46.) This delay was caused by the insurers in that they did not address

the letter to the insured's address, used on other previous occasions. (R 21, 22.) Within the 20 days from the receipt[3] of the demand, on January 13, 1954, the insured addressed a letter to the insurers nominating and appointing H. J. Bachtold as his appraiser. In said letter it is to be noted that the insured expressly stated in the letter that this person was appointed "for immediate performance of his duties prescribed by the terms of my policy" and, further, said letter made a demand that the payment under the policy be made prior to the lapse of said 12 months' period, that is, before the last day an action could be filed, to-wit, Friday, January 22, 1954. (R 33.) This letter was received in due course by the insurers. (R 28.) On January 15, 1954, the insured's appraiser, H. J. Bachtold, wrote a letter to Howard T. Russell, the insurers' appraiser, advising him of his appointment and stated that on January 16, 1954, he was going to examine the testimony given at the first trial, the proof of loss and ascertain the materials and costs in the locality and that he would be prepared to proceed with his duties any day of the next week between Monday and Friday (January 18 to January 22). Said letter also contained the following: "Mr. Cox expresses the view that he would like to have the matter disposed of at an early date." (R 36.) The insurers' appraiser, Mr. Russell, although he received the letter, did nothing about it until after the 12 month period for bringing suit expired, in that he

[3]The 20 days time to name appraisers runs from the date of the receipt of the demand, *Covey v. National Union Ins. Co.*, 31 Cal. App. 579 at 589.

first communicated with H. J. Bachtold (by telephone) on January 27, 1954. Contrary to the findings of the trial court, the insured did all matters and things required of him under the terms and conditions of the policy to effect and consummate an appraisal prior to the expiration of the 12 month statute of limitations. The appraisal proceedings were delayed beyond the 12 month period by the insurers' delay in demanding appraisal and by the insurers' appraiser, in that he did not even acknowledge the receipt of the letter of January 15 until two days after the running of the statute. Where the submission to arbitration fails of results by reason of the failure of the appraiser of the assurer, and the insured and his appraiser have fully performed their obligations as to arbitration, the insured need not proceed further with the view to ultimate arbitration as a condition precedent to suing on the policy.

The leading case on this question is *Koyer v. Detroit F. & M. Ins. Co.,* 9 Cal. (2d) 336. In that case the insured gave demand for appraisement and named the appraiser and the insurer named its appraiser but the appraisers failed to select an umpire until July 10, 1933. The appraisers did not meet with each other to compare notes for the first time until July 12, 1933, which was the date of the expiration of the 90-day period in which the appraisal should be consummated. The insured then filed the action to recover under the policy and the defense of prematurity was raised by the insurer. The trial court found that the award or appraisal was not had or completed within the

90-day period through no fault of the insured or his appraiser. The court on appeal sustained the trial court and at page 341 stated:

> "* * * Therefore, the rule by which plaintiff's conduct is to be adjudged is the following: where a submission to arbitration fails of results by reason of the failure of the appraisers to agree upon an umpire, and both the insured and insurer have acted in good faith so that the failure is not due to the fault of either, *the insured has fully performed his obligation as to arbitration and need not proceed further with a view to ultimate arbitration as a condition precedent to suing on the policy.* (See 94 A.L.R. 502.) A reasonable interpretation of the finding which we have quoted is that the delay was caused by the failure of the appraisers to select an umpire and thereafter to proceed diligently with their work. This interpretation, which is borne out by the evidence, would imply that the appraisers were equally at fault—at least that the fault was not entirely that of the insured's appraiser—and under these circumstances it could not be said that the delay was attributable to the insured or his appraiser within the meaning of the policy provisions. The insured would be no more to blame than the insurers. By the terms of the policies the insured was responsible for the fault of his appraiser if it resulted in the failure of the appraisal, and the insurers had an equal responsibility for the conduct of the appraiser appointed by them. When, therefore, the appraisement failed for causes not attributable to the appraiser for the insured (and the failure due to the fault of both appraisers presents such a

case), the insured was not precluded from maintaining an action on the policies. *The limitation of plaintiff's right to sue was removed when the appraisal failed because of the fault of both appraisers. The provisions of the policies admit of no other construction.*" (Italics ours.)

In the note in 94 A.L.R. referred to in the above quotation, the authorities are exhaustively compiled. These show that under the great majority view, including California, the failure of the appraisal to be consummated within the specified time (not caused by the insured), permits suit to recover under the policy without an appraisal first being had. This view was likewise followed by this Honorable Court in *Aetna Ins. Co. v. Heffnerlin,* 260 Fed. 695, where the court on page 700 stated:

"* * * Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement but may maintain this action. Uhrig v. Williamsburgh Fire Ins. Co., 101 N. Y. 362, 4 N.E. 745; Western Assurance Co. v. Decker, 98 Fed. 381, 39 C.C.A. 383; Solem v. Conn. Fire Ins. Co., 41 Mont. 351, 109 Pac. 432."

In *Covey v. National Union Fire Ins. Co.,* 31 Cal. App. 579, the insurer made its demand for an appraisal more than 90 days after the preliminary proof of loss was received by it (demand was received by

plaintiff on the 91st day). The court held that "not having received notice in time, plaintiff (insured) was not compelled to submit to appraisement of the loss and the case stood as though no appraisal was had". (See page 589.)

The result should be the same whether the notice was received after the time allowed or, as in the case at bar, at a time so shortly before the expiration of such time that the appraisement was not completed within the required time, solely through the fault of the insurer and/or its appraiser. We respectfully submit that the sole express ground of the trial court's decision finds utterly no support in the record. To the contrary, the record supports the conclusion that the insured complied with all the requirements of this policy relative to appraisal and, hence, had the right to commence said action without awaiting the completion of appraisal proceedings.

The only reasonable construction of the limitation of action provision of the policy is that the two conditions of said provision must be so coordinated so that the insurers' exercise of one condition will not defeat the other. The policy can not be construed to permit the insurers to so delay the exercise of any requirement of the policy as to put the insured in a position where he cannot enforce his right to recover under the policy. Therefore, the phrase "unless all the requirements of this policy shall have been complied with" when applied to the performance of the appraisal clause of said policy must be construed to mean that the failure to complete an appraisal does not bar an

action upon the policy unless such failure was caused by the delay or fault of the insured. The facts are undisputed that the insurers without provocation delayed the demand for the requirement of an appraisal until so close to the end of the period of limitation of action that the insured was unable (despite full performance or compliance with the terms of the policy) to cause the appraisal proceedings to be completed prior to the outlawing of the action. The limitation upon the insured's right to sue was removed when the appraisal failed because of such delay. The provisions of the policy admit of no other construction. Therefore, the trial court's holding that the insured failed to submit to such appraisal and because thereof there has been no appraisal pursuant to the terms of the policy, was prejudicially erroneous.

(B) THE COURT ERRED IN HOLDING THAT THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO RAISE THE PLEA OF ABATEMENT.

The rule is well settled in the California courts, and also in the federal and most state courts, that an unconditional denial of liability by the insurer after the insured had incurred loss and made claim under the policy gives rise to immediate right of action and the provisions for appraisement are waived. This rule is reaffirmed in *Bollinger v. National Fire Ins. Co., supra* at page 405, where many cases are cited therefor. The court in the *Bollinger* case further states at page 405 that "the desirability of the rule is ap-

parent for if a waiting period was necessary notwithstanding the election of the insurer to deny liability, it would become a trap for the unwary and would encourage dilatory tactics as in the present case". The above is particularly applicable to the case at bar as will be shown in the next point.

Reference is made to *Jacobs v. Farmers Mutual Fire Ins. Co.,* 5 Cal. App. (2d) 1, involving the necessity of submitting the question of the amount of loss sustained to arbitration as a necessary prerequisite to maintaining an action on the fire insurance policy, particularly the following language appearing on page 7, to-wit:

> "It will be observed that the policy in this case does not absolutely require arbitration as a condition precedent to the maintenance of an action. It is only *when there is a dispute between the parties* regarding the amount of the damages sustained that arbitration is required. The case of *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co.,* 66 Cal. 253 (5 Pac. 232), relied on by the defendants, may be readily distinguished from the principle above announced. In the case last mentioned, the complaint specifically alleged 'that a difference arose as to the amount of loss'. In that event an arbitration did become a condition precedent to the maintenance of the action. The court quite properly held in that case that the failure to arbitrate the amount of the disputed loss was a bar to the action. In the present case no such dispute was alleged or proved. The failure to arbitrate the amount of the loss was therefore not a bar to this action."

Prior to the receipt of the demand on January 6, 1954, the insured was never advised in any form of a disagreement as to the amount of the loss or the amount of the reasonable market value of the property destroyed. But, to the contrary, from the date of the fire, the insurers conducted a series of dilatory tactics by making successive demands for the performance or the further performance of every requirement of the policy, the failure to comply with any one of which would relieve the insurers from all liability. The only exception to the above statement is the answer that the insurers filed in the first action before the Superior Court of Shasta County. By Paragraph III of their answer, they denied generally the allegation of the complaint that "the plaintiff's loss thereby was $14,670.40". Further, by the fifth paragraph of their answer, it is averred:

> "Answering the allegations of Paragraph VIII,[4] defendant denies that the sum of Thirteen Thousand Dollars ($13,000.00), or any sum whatsoever, is now due plaintiff from defendant * * *" (R 52.)

The trial court's opinion stated that it was not aware of any case which involved the precise situation where there was an answer by the insured to a complaint in a prior suit in which a nonsuit was granted, but the court stated that the authorities cited in 3 A.L.R. (2d) 416 (holding that a denial of liability

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[4]Paragraph VIII of the complaint reads that no part of said loss has been paid and the sum of $13,000.00 is now due thereon from the defendant to the plaintiff to plaintiff's damage in the sum of $13,000.00. (R. 50.)

by an insurer in its answer to the complaint does not constitute a waiver of arbitration in an action in which the complaint was filed) was applicable to the condition herein involved.

We respectfully submit that the court below is in error in this regard. The California courts have held that the mere denial of liability does not prevent the pleader from asserting the defense of failure to submit to arbitration, they further hold that if the pleader proceeds to trial on merits (based upon such general denial of liability) without properly asserting the requirement of appraisal, the plea of prematurity because of lack of appraisement is waived. See *Lanrith v. So. Coast Rock Co.,* 136 Cal. App. 457 at 462; *Pneucrete Corp. v. U. S. Fid. & Guarantee Co.,* 7 Cal. App. (2d) 433 at 441.

Since the insurers proceeded to trial in Shasta County on the merits without asserting the defense of failure to submit to arbitration, the defense was waived in the first action. Further, the defendants waived said defense by neglecting to specifically plead a lack of arbitration. (See *Jacobs v. Farmers Mutual Ins. Co., Inc., supra,* at page 7.) From the foregoing, the defendants by their failure to plead and by submitting to trial on merits without asserting the defense, have clearly waived the same. Is this waiver only applicable to the first action or can the waiver be asserted in subsequent actions? The law is that any unconditional denial of liability by the insurers after the insured has incurred the loss and made the claim under the policy, gives rise to an immediate

right of action. The form of the denial of liability should be immaterial, that is, whether it is merely stated orally, or is put in letter form or is set forth in a verified pleading. Whatever be its form, the question of whether it constitutes an unconditional denial of liability depends upon its contents. The denials of this answer were unconditional and further verified.

If the insurers had any doubt as to the question of the amount of the loss, their denial in that regard could have been upon the want of information or belief. By that type of denial they would have indicated the absence of an *actual* controversy as to the amount of the loss. In the case at bar, however, two representatives of the insurers' adjustment bureau examined the insured in great detail on two different occasions, visited the scene of the fire and obtained an inventory of the property lost. With that information it must be inferred that they had ample knowledge of the extent of the loss. This conclusion was confirmed by an absolute denial set forth in their answer, which was verified approximately six months after the date of the fire.

We respectfully submit that proceeding to a trial upon this verified denial of all liability under the policy clearly comes within the definition of an unconditional denial of liability and constitutes a waiver of the defense of lack of appraisement in any subsequent action between the parties on the same cause of action.

(C) THE COURT ERRED IN HOLDING THAT DEFENDANTS WERE NOT ESTOPPED TO RAISE THIS PLEA OF ABATEMENT.

The insurers were clearly guilty of dilatory tactics for the purpose of defeating the insured's right to a trial on merits. Although the insurers had full knowledge of all necessary facts, they presented these dilatory objections piece-meal—raising one and when that one had spent its course raising a new one—and continuing this course of tactics until they would have succeeded in defeating the insured's day in court on the merits of his cause. These dilatory tactics rendered it impossible to comply with the provisions of the policy before the time for filing suit expired. Under these circumstances and under the facts set forth in this record the insurers are estopped from setting forth their plea of abatement on the ground of prematurity.

It would be manifestly unjust for this court to prevent a trial on the merits, which the law favors, thereby causing a technical forfeiture of the insured's rights, which the law discourages, by upholding the plea of prematurity of the commencement of the action caused solely by traps formulated and executed by the insurers.

The insured purchased for the consideration of $162.50 the policy of fire insurance for a term of three years covering the real and personal property which was destroyed by a fire occurring during the term of said policy, on the 25th day of January, 1953. The purpose of this insurance policy was to insure and to

pay a stipulated amount of loss in the event of destruction by fire.

The insured, by insurers' tactics, is deprived of the benefits of the contract which the insured purchased. Although the insured made a full disclosure to both Frank Plummer and John W. Smith, two of defendants' agents employed by them to adjust this loss, the insurers did not elect to request an appraisal proceeding to determine the amount of this loss at any time until approximately 19 days before the expiration of the period for the commencement of the action. Instead of doing anything that would indicate to the insured that there was a controversy as to the amount of the loss or the reasonable market value of the loss of the properties destroyed, the insurers first gave notice of a defective proof of loss (although this was prepared by the insureds' own agent) and, secondly, gave notice of the failure of the insured to submit to an examination under oath. The latter was made even though the insured was extensively interviewed and examined by both the insurers' local and district adjusters. The insurers sprang this trap at the trial of the first filed action. The nonsuit in that action was based upon one ground, that is, that plaintiff did not submit to examination under oath. This plea was extremely technical in that the insured, in addition to being interviewed as above stated, *was examined extensively at trial under oath, but still the trial court felt that the motion should be granted so that the plaintiff could protect himself in the future from any such technical pleas of abatement.* (R 45). This trap

was not fatal in that the period of limitations had not run at that time and sufficient time remained for the plaintiff to submit to a further examination under oath and commence a new action.

Although this nonsuit was granted on November 4, 1953, or 82 days before the 12 month period prescribed by the policy expired, and although the insurers owed a duty of good faith to the insured the insurers did nothing until they forwarded their letter of December 23, 1953. The insurers by said letter fixed the time and place for the taking of said testimony under oath as the 7th day of January, 1954, at the office of Lawrence J. Kennedy, Jr., in the Courthouse in Redding, and by the same letter and for the first time demanded an appraisal. This letter was registered, with return receipt requested, and the post office was unable to locate Mr. Cox to sign said return receipt until January 6, 1954. Therefore, there remained but 19 days before the 12-month period would expire in which to consummate the appraisal proceedings and to have an award filed. It is but a natural inference that at that time the defendants made this election, they knew that the appraisal proceedings could not be consummated before the expiration of the period of limitations on January 25, 1954. This is self-evident, because the policy provides that the insured would have 20 days from receipt of such demand to appoint an appraiser and then if the appraisers neglected to appoint an umpire for a period of fifteen days then the Superior Court could appoint one. The operation of these provisions of the policy

obviously contemplate a period of greater than 19 days.

Seven days from receipt of the demand, on January 13, the insured wrote a letter designating and nominating his appraiser and suggesting immediate performance of the duties of the appraiser. In that letter, he warned that if the loss were not paid by the last day an action could be filed under the policy that such failure constituted a refusal to pay and an unconditional denial of liability. The appraiser appointed by the insured immediately (by letter dated January 15, 1954) advised insurers' appraiser that he would make all preliminary investigations and reviews promptly and would be prepared to meet with him any day between January 18 and January 22 and suggested therein that the matter be disposed of immediately. The insurers' appraiser did not act on this request until January 27, 1954, two days after the limitation period had expired, when he communicated telephonically with the insured's appraiser. Although the insured and his appraiser did everything humanly possible to consummate the appraisal between the time of the receipt of the demand therefor and the expiration of the limitation period, and even if it was possible to consummate the appraisal during such a short period, the failure to do so was caused solely by the insurers' appraiser.

Irrespective of these circumstances, the insurers by their answer filed on March 16, 1954, sought to defeat a recovery under the policy by the plea of prematurity of the action, because the award of the appraisers

was not completed before the action was filed. It is to be noted that there was no cause for any delay in making the demand for the appraisal, if the appraisal was sought for the purpose of determining the amount of the loss and not to defeat a recovery. This is true first because the insurers' investigation and the proofs of loss and inventory filed with them should have amply informed the insurers as to whether any controversy existed relative to the amount of the loss. Secondly, after the entry of the nonsuit on November 4, 1954, the insurers had the additional benefit of the insured's testimony under oath at the trial, but still the insurers did nothing until the insured recomplied with the two defenses raised in the first action. It is of interest to note that the insurers did not postpone their demand until after the plaintiff was again examined under oath on January 7, 1954. This demonstrates that the examination under oath served the insurers no useful purpose other than to attempt to defeat recovery under the policy. Since there were no contacts between the insurers and the insured between November 4, 1953, and December 23, 1953, nothing could have occurred which could have warranted the delay in demanding an appraisal during that period.

We respectfully submit that the insurers were guilty of bad faith and likewise guilty of such premeditated conduct as to render it impossible for the insured to comply with the provisions of the policy within the time permitted by the policy. The language of the court in *Fitzpatrick v. N. A. Accident Ins. Co.*, 8 Cal. App. 264 at 266 is particularly applicable:

> "If the company had been guilty of bad faith or such conduct as to render it impossible to comply with the provisions of the policy before the time limited for presenting suit had expired, it would be estopped from relying thereon (Joyce on Insurance, Section 3220.)"

Likewise, the language appearing in *Amusement Syndicate Co. v. Prussian National Ins. Co.,* (Kansas) 116 Pac. 620 at 623:

> "It will not be in furtherance of justice to allow them after having remained so long silent on the subject to raise the question of arbitration, not for the purpose of procuring an appraisement of the loss but to defeat recovery."

The shocking injustice of the defendants' plea of prematurity is clearly manifested by the fact that if the insured had waited for the completion of the appraisal proceedings, his rights to commence an action would have been forever barred by the limitation of action provision of the policy.

Since the policy provided that the insured was required to comply with all the provisions of the policy and also commence an action within twelve months next after the inception of the loss or be forever barred from recovering under the policy, the insurers should be estopped and completely debarred from relying on the appraisal provisions of said policy, when, as here, they have timed their demand so that it is physically impossible for the insured to comply with such provisions within the time limited for bringing suit. No court would be justified in making it possible

for an insurer to befeat the performance of its contracts by formulating such a trap for the insured, so that no matter which way he elected to proceed, he was debarred from enforcing the policy.

(D) THE COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPPLEMENTAL COMPLAINT.

As shown above, the insurers instigated the appraisal proceeding at a time when it was problematical that it could have been completed prior to the running of the period to bring the action, and, hence, for several reasons the insurers could not assert the defense of prematurity of the commencement of the action.

There resulted from insurers' said delayed demand a further complication, which again compelled the insured to act at his peril. The further complication was the question whether this appraisal proceeding, which did not result in an award until after the limitation period expired, was or was not operative. Since the insurers started this proceeding and put the insured to the effort and expense thereof, the insurers should be bound by any award therefrom, and to that end the insurers should be estopped to deny the validity thereof, merely because it was not concluded in the twelve months period.

To avoid another trap, the insured filed his motion for leave to file a supplemental complaint, setting forth the appraisal proceedings and resultant award. If the award is valid, which appellant claims it is,

then one issue made by the complaint and answer thereto has been altered by a subsequent event. To deny a party the right to set forth this changed or altered issue by way of a supplemental complaint is an abuse of discretion by the trial court.

It is the very office of a supplemental pleading to set forth any enlarged or changed kind of relief to which a plaintiff is entitled. (See *Popovitch v. Kasperlek,* 76 Fed. Supp. 233.) The insured in the case at bar was just as much entitled to set up this award as the party was entitled to set up that the action had become *res judicata* by virtue of proceedings in the state court, as in *Kimmel v. Yankee Lines,* 125 Fed. Supp. 702, affirmed in 224 Fed. (2d) 644. The trial court denied the motion in the case at bar upon the erroneous ground that the action was prematurely brought.

As shown hereinbefore, the action was not premature and not being such the subsequent change in one issue (amount of recovery) should have been made a part of said action by the granting of the insured's said motion.

VI.

CONCLUSION.

We have conclusively shown that the record will support a finding either that the insured had complied with every requirement of the policy, or that the insurers have waived or are estopped to set up the appraisal provisions of the policy. If there is any evi-

dence to support a verdict for the plaintiff, this summary dismissal was erroneously granted and should be reversed. Since there was ample evidence to submit to a jury on the issues herein involved, it was prejudicial error to deny plaintiff that constitutional right. It is respectfully submitted that judgment and order below be reversed.

Dated, January 14, 1957.

Respectfully submitted,

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